

Exhibit 4

*State of California ex rel. Ven-A-Care of the Florida Keys, Inc. v.
Abbott Labs, Inc. et al., Civil Action No. 03-11226-PBS*

**Exhibit to the November 25, 2009 Declaration of Philip D. Robben
in Support of Defendants' Joint Motion for Partial Summary Judgment**

Vladeck, Ph.D., Bruce C. - Vol. II
New York, NY

June 21, 2007

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

-----X MDL NO. 1456
IN RE: PHARMACEUTICAL INDUSTRY : CIVIL ACTION:
AVERAGE WHOLESALE PRICE LITIGATION : 01-CV-12257-PBS

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THIS DOCUMENT RELATES TO: :
U.S. ex rel. Ven-A-Care of the : CIVIL ACTION:
Florida Keys, Inc. v. Abbott : 06-CV-11337-PBS
Laboratories, Inc. :
-----X

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

-----X
STATE OF ALABAMA, : CASE NO.
Plaintiff, : CV-05-219
v. :
ABBOTT LABORATORIES, INC., : JUDGE
et al., : CHARLES PRICE
Defendants. :
-----X

Henderson Legal Services
202-220-4158

1 MS. BROOKER: Objection. Form.

2 A. That is correct.

3 Q. In fact, if the federal government
4 didn't approve the methodology, it couldn't be
5 used. Right?

6 MS. BROOKER: Objection. Form.

7 A. That's correct.

8 Q. And the states had leeway to be
9 able to determine the specific ingredient
10 reimbursement basis that they wanted, as long as
11 it was acceptable to the federal government.

12 Right?

13 MS. BROOKER: Objection. Form.

14 A. And consistent with the statute,
15 yes.

16 Q. Okay. Now -- so, it was possible,
17 for example, if you look at Delaware, you'll see
18 that the Delaware ingredient reimbursement basis
19 in place at the time of this document, 1995, was
20 AAC, actual acquisition cost?

21 A. I do.

22 Q. It was -- it was possible, and if

1 Delaware wanted to reimburse on the basis of
2 actual acquisition cost, it could do that.

3 Right?

4 A. That's correct.

5 Q. And if you look, for example, at --
6 there are a number of states, but if you look, for
7 example, at New York, at the time, New York, the
8 reimbursement -- ingredient reimbursement basis is
9 indicated as AWP without any discount. Right?

10 A. That's correct.

11 Q. Now, you would agree with me that
12 using those two examples, the State of Delaware
13 would be paying for a drug a lot less than New
14 York was paying for the same drug. Right?

15 MR. BREEN: Objection. Form.

16 A. I believe in general we would have
17 expected that, yes.

18 Q. So, your understanding would be
19 that if Delaware was paying actual acquisition
20 costs that the provider had paid to acquire the
21 drug, that Delaware was paying less than New York,
22 which had decided to pay the average wholesale

1 price published. Correct?

2 MS. BROOKER: Objection. Form.

3 A. That's correct.

4 Q. And as far as the federal

5 government was concerned, there wasn't any issue

6 or problem with New York deciding to pay more than

7 Delaware paid for the exact same drug.

8 MS. BROOKER: Objection.

9 Q. Isn't that right?

10 MS. BROOKER: I'm sorry. Objection.

11 Form.

12 A. Both systems, right, were

13 consistent with the -- with the statute and our

14 policies.

15 Q. Did you know -- independent of

16 this, did you know that there was a point in time

17 in your tenure that Delaware used an actual

18 acquisition cost basis for drugs?

19 A. I don't recall. I may have known

20 it at some point, but I have no memory of having

21 known it.

22 Q. And I take it that if -- if New

1 York decided to pay, as it did in this period of
2 time, to reimburse for Medicaid using an
3 undiscounted AWP, the federal government did not
4 have a problem with its share being driven by that
5 number as opposed to the actual acquisition cost
6 that was being used in Delaware.

7 MR. BREEN: Objection. Form.

8 MS. BROOKER: Objection. Form.

9 Q. Is that right?

10 A. I'm not sure I would characterize
11 it as the federal government did not have a
12 problem. The federal government permitted New
13 York to use the AWP methodology.

14 Q. So, the federal government
15 permitted New York to pay an undiscounted AWP at
16 the very same time -- the federal government
17 permitted New York to reimburse for Medicaid on
18 AWP, without any discount, at the same time that
19 it was permitting Delaware to pay actual
20 acquisition cost, a lower amount for the same
21 drugs?

22 MR. BREEN: Objection. Form.

1 MS. BROOKER: Objection. Form.

2 A. That's correct.

3 Q. And from your agency's standpoint,
4 there was nothing wrong with that?

5 MR. BREEN: Objection. Form.

6 MS. BROOKER: Objection. Form.

7 A. Again, I would -- I would disagree
8 with the characterization -- characterization.

9 From our agency standpoint, that's
10 what the law and the structure of the program
11 permitted and called for.

12 Q. So, the law and the structure of
13 the Medicaid program would permit one state to pay
14 at actual acquisition cost and another one to pay
15 an undiscounted AWP at the same time?

16 MR. BREEN: Objection. Form.

17 A. That was my understanding of the
18 law. Yes, sir.

19 Q. And, in fact, in the Medicaid
20 program, at the same time in 1995, during your
21 tenure, for the same drug that Delaware was
22 reimbursing on actual acquisition costs, if that

1 drug was covered by Medicare, Medicare was paying
2 more. Right?

3 MS. BROOKER: Objection. Form.

4 A. Yes, absolutely.

5 Q. Because they were paying 100
6 percent of AWP. Right?

7 A. Yes.

8 Q. And, again, as far as the federal
9 government was concerned, that was appropriate for
10 that time, given the statutes that existed?

11 MS. BROOKER: Objection. Form.

12 A. You know, to characterize the
13 federal government as sort of a fiction, I would
14 say that the statutes that existed at the time
15 permitted that.

16 Q. And the statutes that we're talking
17 about, these were laws of the United States passed
18 by the U.S. Congress. Right?

19 A. That's correct.

20 Q. So, Congress had decided that
21 that's the way it would work?

22 MR. BREEN: Objection. Form.

1 A. Congress decided that it was
2 permissible.

3 Q. So, to the extent that New York was
4 reimbursing Medicaid on AWP, without any discount,
5 while Delaware was reimbursing on actual
6 acquisition cost, New York wasn't improperly
7 overpaying; were they?

8 MS. BROOKER: Objection. Form.

9 A. Again, their judgment was New York
10 was within its legal rights to do so.

11 Q. And there are other states -- if
12 you look down the column, there are other states
13 where -- that were also using an undiscounted AWP
14 besides New York.

15 For example, if you look at Idaho,
16 that was -- the fact that Idaho decided to do it
17 that way, there was nothing wrong with that
18 either?

19 A. It was permissible under the law,
20 yes.

21 Q. Now, you would expect, wouldn't
22 you, Dr. Vladeck, that if the State of Delaware

1 Medicaid people could figure out how to reimburse
2 on actual acquisition cost, that other states
3 could do the same thing? You would expect that.
4 Right?

5 MS. BROOKER: Objection. Form.

6 MR. BATES: Object to form.

7 A. Please restate your question.

8 Q. Well, the people -- the Medicaid
9 people in Delaware didn't have some secret
10 knowledge that nobody else in the country had,
11 right, as far as you knew?

12 MR. BATES: Objection to form.

13 MS. BROOKER: Objection. Form.

14 A. That's -- I don't believe so, no.

15 Q. Okay. So, presumably, if the
16 people in Delaware that ran Medicaid could figure
17 out how to reimburse on actual acquisition cost,
18 so could the Medicaid people in every other state.
19 Right?

20 MS. BROOKER: Objection. Form.

21 MR. BATES: Object to form.

22 A. They were legally permitted to

1 choose to do so, yes.

2 Q. And they were legally permitted to
3 choose not to do it that way. Right?

4 A. That's correct.

5 MS. BROOKER: Objection. Form.

6 Q. Well, since Mr. Bates in here,
7 let's -- let's look at Alabama, which is on the
8 first line.

9 Alabama had ingredient
10 reimbursement basis of WAC plus 9.2 percent.

11 Do you see that?

12 A. Yes, I do.

13 Q. And if Alabama decided that they
14 would use WAC, plus the 9.2 percent on top of WAC,
15 they were entitled to do that. Right?

16 MS. BROOKER: Objection. Form.

17 A. Yes, they were.

18 Q. And based on your understanding of
19 WAC, would you expect that a reimbursement basis
20 that was based on WAC would result in a lower
21 payment than one based on AWP?

22 MR. BREEN: Objection. Form.

1 MS. BROOKER: Objection to form.

2 MR. BATES: Objection to form.

3 A. My understanding is that WAC, plus
4 a percentage in the range of 9 percent, would be
5 roughly comparable to a state that chose to pay
6 AWP minus 10 percent.

7 Q. You don't really know that that's
8 true for every single drug; do you?

9 MS. BROOKER: Objection. Form.

10 A. I assume it's not true for every
11 single drug because I assume that the relationship
12 between given drugs and WAC and AWP varies from
13 state to state and from pharmacy to pharmacy.

14 Q. And to the extent the state decided
15 that they would pay AWP minus 10 percent, for
16 example, just to pick one, Nevada, and another
17 state decided that they would pay AWP minus 10.5
18 percent. which is Oregon, or Oklahoma, rather, the
19 states could come up with those fine gradations if
20 that's what they wanted to do. Right?

21 MR. BREEN: Objection. Form.

22 MS. BROOKER: Objection. Form.

1 A. Yes.

2 Q. Now, there were other states that
3 had entirely different reimbursement systems.
4 Isn't that right? For example, Arizona.

5 A. Well, no. I would say that all the
6 states had either some version of AWP or some
7 version of acquisition costs, except the States of
8 Tennessee and Arizona, which did not directly pay
9 for retail prescription drugs but, rather, had all
10 of their beneficiaries enrolled in managed care
11 plans, which contracted for those drugs.

12 Q. Well, and on that point then,
13 states were also entitled, if they wanted to go
14 that route, to do what Tennessee and Arizona had
15 done, which was to do it -- the reimbursement in
16 an entirely different way?

17 MS. BROOKER: Objection. Form.

18 A. No, I wouldn't -- I wouldn't
19 characterize it that way. I would say to provide
20 that Medicaid beneficiaries would receive service
21 through capitated claimants to a healthcare plan
22 rather than for reimbursements for individual

1 services.

2 Q. And that was proper to do under the
3 structure -- the statutory structure?

4 MS. BROOKER: Objection. Form.

5 A. Under a set of very specific and
6 limited circumstances, yes.

7 Q. So, would the HCFA have approved
8 Tennessee doing what it did?

9 A. HCFA approved the TennCare plan,
10 yes.

11 Q. And HCFA also approved the Arizona
12 healthcare cost containment program?

13 MS. BROOKER: Objection. Form.

14 A. It did, although I believe, if I
15 remember correctly, that was under a statutory
16 mandate to approve it.

17 Q. Do you know whether Arizona or
18 Tennessee paid more or less than other states
19 based on the different way they were doing it?

20 MS. BROOKER: Objection. Form.

21 A. For prescription drugs?

22 Q. Yes.

1 A. I wouldn't have any information on
2 what they paid for prescription drugs.

3 Q. Now, focusing, again, if you would,
4 Dr. Vladeck, on Delaware vs. New York, and the way
5 they were doing it as indicated on Exhibit Dey
6 022, New York was including in its reimbursement
7 whatever the spread was between AWP and actual
8 acquisition costs. Right?

9 MR. BREEN: Objection to form.

10 A. To the extent there was a spread,
11 paying at average wholesale price would
12 incorporate that spread, yes.

13 Q. Right. So, to the extent that
14 there was a spread between AWP and actual
15 acquisition cost in New York, that spread was part
16 of the reimbursement that New York decided to pay.

17 Right?

18 MR. BREEN: Objection. Form.

19 A. Yes.

20 Q. And Delaware, using actual
21 acquisition cost, had -- had eliminated that
22 spread. Right?

1 MS. BROOKER: Objection. Form.

2 A. In principle, yes.

3 Q. Okay. So, in -- in the time period
4 that you were running HCFA, you had one state on a
5 Medicaid program where there was no spread,
6 Delaware, and one state that had the maximum
7 spread because they paid 100 percent of AWP.

8 Right?

9 MS. BROOKER: Objection. Form.

10 MR. BREEN: Objection. Form.

11 A. Yes.

12 Q. And, again, the fact that one state
13 had the full spread between AWP and actual
14 acquisition cost, New York, that was acceptable
15 within the structure of the program that you were
16 running. Right?

17 MS. BROOKER: Objection. Form.

18 A. That was -- that was what the law
19 permitted, yes.

20 Q. And the fact that there was nothing
21 in the law that prohibited New York from deciding
22 to pay the full spread between acquisition cost

1 and AWP; was there?

2 MR. BREEN: Objection. Form.

3 A. There was nothing in the law that
4 spoke directly to that. The law permitted New
5 York to pay AWP.

6 Q. So, there was nothing that made the
7 spread between AWP and actual acquisition cost
8 that New York was paying illegal?

9 MS. BROOKER: Objection. Form.

10 A. Well, when you characterize the
11 spread, I think it, frankly, gets to -- my
12 layman's understanding of what this case is about
13 was what AWP means, and the size of the spread,
14 and I'm not competent to -- to speak to that.

15 I think it was legal for New York
16 State to pay what they thought AWP was. Whether
17 AWP was a legally arrived at number I think is the
18 subject of litigation, on which I'm not competent
19 to comment.

20 Q. And I don't want -- I'm not asking
21 you about the litigation or about anything in
22 terms of how the government views this now.

1 I'm just asking you, when you were
2 running HCFA in -- in the time period that you
3 were the head of that agency, there is nothing
4 that you know about that indicated that the
5 existence of a spread between AWP and actual
6 acquisition cost was illegal?

7 MR. BREEN: Objection. Form.

8 MS. BROOKER: Objection. Form.

9 Asked and answered.

10 Q. You can answer.

11 A. That the very existence of a spread
12 was illegal? No. We perceived that there
13 probably was a spread.

14 Q. You perceived that there probably
15 was a spread?

16 A. Yes.

17 Q. And with that perception in mind,
18 HCFA approved state plans that had the spread
19 built into the reimbursement basis. Correct?

20 MS. BROOKER: Objection. Form.

21 A. HCFA approved state plans that paid
22 on some basis relative to AWP, because that's what

1 the statute provided for.

2 Q. And in doing that you were
3 approving plans that had the spread built into the
4 reimbursement methodology. Right?

5 MS. BROOKER: Objection. Form.

6 A. Again, I would say that had a
7 spread built into the reimbursement methodology.

8 Q. Fine. But you also had one state,
9 at least, that had no spread. Right?

10 MS. BROOKER: Objection. Form.

11 MR. BREEN: Objection. Form.

12 A. Yes, that's correct.

13 Q. Now, at -- at -- at the same time
14 that we're focusing on with Exhibit Dey 022, which
15 is in the time period of 1995, which is the point
16 in time during your tenure as the head of HCFA --

17 A. And if I may say, it refers to the
18 time period of '93/'94, but --

19 Q. And, again, that was -- that was
20 the period of time that you were running HCFA, at
21 least part of that time?

22 A. Part of that time, yes.

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1 confidentiality restrictions as well, in terms of
2 what the states made -- did with the data.

3 Q. Okay. So, with respect to -- just
4 focusing on that, HCFA, under the statutory
5 scheme, was entitled to share AMP data with the
6 states. Isn't that right?

7 A. Of course, yes.

8 MR. BREEN: Objection. Form.

9 MS. BROOKER: Objection. Form.

10 Q. And did HCFA do that?

11 A. As far as I know.

12 Q. So, as far as you know, people
13 within HCFA shared AMP data with state Medicaid
14 agencies?

15 A. That was my understanding.

16 Q. What was that based on?

17 A. What was what based on?

18 Q. Your understanding. What was your
19 understanding based on?

20 A. Of the process by which the HCFA
21 staff worked with the states in administering the
22 rebate program.

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1 Right?

2 MS. BROOKER: Objection. Form.

3 A. Yes.

4 Q. So, for example, looking back at
5 Exhibit Dey 022, the one-page sheet that we had
6 that had all the reimbursement basis, the
7 responsible directors of the Medicaid agencies of
8 these -- of each of these states would be able to
9 peruse AMP data and compare that to what they were
10 reimbursing on. Right?

11 MR. BREEN: Objection. Form.

12 MS. BROOKER: Objection. Form.

13 MR. BATES: Objection to form.

14 A. When you talk about "perusing,"
15 again, I don't -- I don't know if they'd even be
16 aware that their agencies had it. But if they
17 were, depending on how their agencies were
18 organized, they might very well be.

19 Q. So, it was entirely -- it was
20 entirely possible for the heads of a state
21 Medicaid agency to look at the AMP data on AMP
22 prices and at the same time look at data as to

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1 what they were reimbursing for those drugs. That
2 was entirely possible. Right?

3 MS. BROOKER: Objection. Form.

4 MR. BREEN: Objection. Form.

5 A. It's -- I don't know any reason why
6 it wouldn't be possible.

7 Q. And within your agency, within
8 HCFA, certainly people within HCFA could sit down
9 and compare the AMP data, for example, for Dey's
10 Albuterol, and see what the AMP was and compare
11 what the AWP was. Right?

12 That was -- that was information
13 that they had in the agency?

14 MS. BROOKER: Objection. Form.

15 A. I believe the -- the way we
16 interpreted the confidentiality provisions of the
17 statute was that the people directly involved in
18 the administration of the Medicaid drug rebate
19 program could have chosen to do so, yes.

20 Q. Right. So, somebody in -- in HCFA
21 that was involved with the rebate program could
22 one day look at the AMP for Dey's Albuterol and

1 compare it to an AWP for Dey's Albuterol?

2 MS. BROOKER: Objection. Form.

3 A. Presumably, yes.

4 Q. And based on your understanding of
5 AWP and AMP, as you've indicated in the course of
6 this deposition and your prior session, you would
7 expect that the AWP -- there was a spread between
8 the AMP and the AWP. Right?

9 MS. BROOKER: Objection. Form.

10 A. Yes.

11 Q. And that would be because the AMP
12 reported to HCFA would include a number of
13 specified discounts. Isn't that right?

14 MS. BROOKER: Objection. Form.

15 A. I don't know what you mean by
16 "specified discounts," but it was my impression
17 that, again, on average, the AMPs would have been
18 for single-source drugs in the range of 15 to 20
19 percent below the AWP, on average, and, for
20 generic drugs, as I've learned in the course of
21 this proceeding, as much as 25 to 40 percent below
22 AWP, on average.